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No. 04-3

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL BOROWIEC, et al.,

Petitioners,

v.

GATEWAY 2000, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Illinois Supreme Court err when it concluded, consistent with rulings of every federal circuit and state supreme court that has addressed the issue, that petitioners had failed to establish that Congress intended the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*, to override – and therefore partially repeal – the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, which makes the arbitration agreement between petitioners and respondent "valid, irrevocable and enforceable"?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Gateway Companies, Inc. hereby discloses that it is a wholly-owned subsidiary of Gateway, Inc., a publicly traded company. Currently, no publicly held company owns more than ten percent (10%) of Gateway, Inc.'s common stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
I. THERE IS NO CONFLICT THAT REQUIRES RESOLUTION BY THIS COURT	6
II. PETITIONERS' MAIN ARGUMENT – THAT THE ILLINOIS SUPREME COURT ERRONEOUSLY APPLIED *CHEVRON* – CALLS FOR MERE ERROR CORRECTION AND THUS DOES NOT MERIT REVIEW BY THIS COURT	8
III. THE ILLINOIS SUPREME COURT CORRECTLY CONCLUDED THAT THE WARRANTY ACT DOES NOT PROHIBIT ARBITRATION	9
A. Neither the Text, Legislative History, nor Purposes of the Warranty Act Demonstrates a Clear Congressional Intent to Prohibit Arbitration	10
B. The Illinois Supreme Court Correctly Declined to Defer to the FTC's Unreasonable Interpretation of the Warranty Act	17
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Abela v. General Motors Corp., 677 N.W.2d 325 (Mich. 2004) 6

Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995) 11, 16, 18

In re American Homestar of Lancaster, Inc., 50 S.W.3d 480 (Tex. 2001) 6

Borowiec v. Gateway 2000, Inc., 808 N.E.2d 957 (Ill. 2004) ..... *passim*

Browne v. Kline Tysons Imports, Inc., 190 F. Supp. 2d 827 (E.D. Va. 2002) 7

Buffington v. Mississippi, 824 So. 2d 576 (Miss. 2002) 7

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) 16

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 16

Davis v. Southern Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002), *cert. denied*, 538 U.S. 945 (2003) ..... *passim*

Dombrowski v. General Motors Corp., 318 F. Supp. 2d 850 (D. Ariz. 2004) 6

FCC v. NextWave Pers. Communications, Inc., 537 U.S. 293 (2003) 4-5, 16, 18

TABLE OF AUTHORITIES – Continued

Page

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) ..... *passim*

Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000) 14

Harrison v. Nissan Motor Corp., 111 F.3d 343 (3rd Cir. 1997) 13

Household Credit Services, Inc. v. Pfennig, 124 S. Ct. 1741 (2004) 4, 18

Howell v. Cappaert Manufactured Hous., Inc., 819 So. 2d 461 (La. Ct. App.), *writ denied*, 827 So. 2d 1161 (2002) 6

Pack v. Damon Corp., 320 F. Supp. 2d 545 (E.D. Mich. 2004) 6

Parkerson v. Smith, 817 So. 2d 529 (Miss. 2002) 7

Philyaw v. Platinum Enters., Inc., No. CL00-236, 2001 WL 112107 (Va. Cir. Ct. Jan. 9, 2001) 7

Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958 (W.D. Va. 2000) 7

Results Oriented, Inc. v. Crawford, 538 S.E.2d 73 (Ga. Ct. App. 2000), *aff'd on other grounds*, 548 S.E.2d 342 (Ga. 2001) 6

Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910 (N.D. Ohio 2003) 7

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 14

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) ..... *passim*

Sikes v. Ganley Pontiac Honda, No. 79015, 2001 WL 1075726 (Ohio App. 8th Dist. Sept. 13, 2001) 6

TABLE OF AUTHORITIES – Continued

Page

Southern Energy Homes, Inc. v. Ard, 772 So. 2d 1131 (Ala. 2000) 6

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 13

Walton v. Rose Mobile Homes LLC, 298 F.3d 470 (5th Cir. 2002) ..... *passim*

STATUTES, REGULATIONS AND RULES

9 U.S.C. §§ 1 *et seq.* ..... i, 2

9 U.S.C. § 2 18

15 U.S.C. §§ 2301 *et seq.* i

15 U.S.C. § 2302 15

15 U.S.C. § 2310 ..... *passim*

15 U.S.C. § 2311 11

16 C.F.R. § 703.5 ..... 8, 17, 19

Sup. Ct. Rule 10 9

815 ILCS 505/2 2

MISCELLANEOUS

40 Fed. Reg. 60,168 (Dec. 31, 1975) 19

64 Fed. Reg. 19,700 (Apr. 22, 1999) 19

S. Rep. No. 91-876 (1970) 14, 15

RESPONDENT'S BRIEF IN OPPOSITION

Gateway Companies, Inc. ("Gateway") respectfully opposes the petition for writ of certiorari. The Illinois Supreme Court held that the Magnuson-Moss Warranty Act ("Warranty Act") does not prohibit binding arbitration of petitioners' disputes with Gateway. In so doing, that court applied settled precedent from this Court holding that statutory claims are subject to arbitration unless Congress clearly intended to preclude arbitration, and that intent is found in the statute's "text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (internal quotation omitted). Nevertheless, petitioners ask this Court to grant their petition to correct the Illinois Supreme Court's alleged failure to properly apply *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). However, even if the Illinois Supreme Court erred in failing to properly apply *Chevron* – and it did not – that fact alone is not a sufficient reason for this Court to grant review. The Illinois Supreme Court's decision is in accord with the decisions of every federal appellate court and state supreme court to resolve the issue. The decision is also correct and fully consistent with this Court's precedent.

COUNTERSTATEMENT OF THE CASE

Each petitioner purchased a personal computer from Gateway or one of its related companies and in separate actions sued to recover damages for, *inter alia*, alleged breaches of express and implied warranties under the Warranty Act and alleged violations of the Illinois Consumer

Fraud and Deceptive Business Practices Act, 815 ILCS 505/2. Gateway moved to dismiss petitioners' suits, or alternatively, to compel arbitration and stay proceedings under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), because each petitioner had agreed to arbitrate "any dispute, controversy, or claim arising out of or relating to" the sale of the computer.

In response, petitioners argued that the Warranty Act overrides the FAA and prohibits binding arbitration of their claims. Without written decision, the trial court in each case denied Gateway's motions to dismiss with respect to all of petitioners' claims. Gateway appealed and the Illinois Appellate Court consolidated the three cases for argument and decision.

On May 31, 2002, the Appellate Court affirmed the trial courts' denials of Gateway's motions to dismiss. That court held, as a matter of federal law, that the Warranty Act repeals the FAA and thereby precludes arbitration of consumer warranty claims. Gateway filed a timely petition for leave to appeal to the Illinois Supreme Court, and that court granted the petition on November 4, 2002.

In a decision issued April 1, 2004, the Illinois Supreme Court reversed the judgment of the Illinois Appellate Court. Pet. App. 2 (published at *Borowiec v. Gateway 2000, Inc.*, 808 N.E.2d 957 (Ill. 2004)). The court explicitly applied the test announced in *McMahon* for determining whether a subsequent act of Congress repeals and overrides the FAA. *Id.* at 8-9 (quoting recitation of *McMahon* test in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) and stating that petitioners' claims are subject to arbitration "unless [petitioners] show that Congress intended to preclude a waiver of a judicial forum

for their federal statutory claims"). In applying this test, the Illinois Supreme Court relied heavily on the analysis contained in two federal appellate court decisions, *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), *cert. denied*, 538 U.S. 945 (2003), and *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002). It reviewed the *McMahon* test as applied by those two courts, and the reasons those courts gave for declining to defer to the Federal Trade Commission's ("FTC") regulation that purports to prohibit binding arbitration of consumer warranty claims. In light of this uniform federal appellate court authority on the question, the Illinois Supreme Court held that the Warranty Act does not preclude binding arbitration of warranty claims. Pet. App. 19.

Petitioners did not seek a stay in the Illinois Supreme Court pending the filing of their petition. Therefore, the cases were returned to the trial courts. Consistent with the Illinois Supreme Court's decision, petitioners initiated arbitrations, and those proceedings are moving forward.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for several reasons. *First*, the decision of the Illinois Supreme Court does not conflict with any decision of this Court, or of any other court of appeals or state supreme court. Every federal appellate court and state supreme court to consider the question has reached the same conclusion: the Warranty Act does not override the FAA and does not prohibit binding arbitration of consumer warranty claims. Petitioners cite an evenly divided Mississippi Supreme Court decision as evidence of a split, but that decision is not

legally binding in Mississippi and, in any event, relied on cases that have since been overruled. This Court denied a petition for writ of certiorari on this precise question just last year, *see Davis v. Southern Energy Homes, Inc.*, 538 U.S. 945 (2003) (No. 02-1117, *cert. denied*, March 31, 2003), and in light of subsequent decisions that have further solidified the growing consensus of federal and state courts on the issue, there is even less reason now to revisit that decision.

Second, the central claim of the petition – that the Illinois Supreme Court failed to properly apply *Chevron* – presents a question of error correction that does not warrant this Court's review. Although petitioners suggest this Court should review the Illinois Supreme Court's decision because it invalidated an agency regulation, this suggestion is misplaced. True, the Illinois Supreme Court rejected the FTC's interpretation of one of its regulations, but that regulation retains validity in all other contexts. In any event, there is no evidence that the FTC considers its interpretation an important one. In the more than 25 years since it enacted the regulation, the FTC has not initiated a single enforcement proceeding to test its interpretation. Thus, the only question presented by this petition is whether the Illinois Supreme Court properly applied *Chevron*. Although petitioners believe that the Illinois Supreme Court erred in its application of *Chevron*, that issue does not merit review, especially because, as described below, the Illinois Supreme Court's decision is fully consistent with *Chevron* and all of this Court's governing precedents, including *Household Credit Services, Inc. v. Pfennig*, 124 S. Ct. 1741 (2004), cited by petitioners.

Third, the Illinois Supreme Court's decision is correct. Under the FAA, courts must "rigorously enforce agreements to arbitrate," even when faced with statutory claims. *McMahon*, 482 U.S. at 226 (quotation omitted). This presumption in favor of arbitrability of statutory claims can be overcome only if "the party opposing arbitration" proves that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 227. Further, if Congress did intend to preclude arbitration of statutory claims, this intent must be evident in the text, legislative history, or "an inherent conflict between arbitration and the statute's underlying purposes." *Id.*

Applying these standards in this case, the Illinois Supreme Court properly held that petitioners had not overcome the presumption in favor of arbitrability of statutory claims. The text of the Warranty Act does not even mention arbitration, much less prohibit it. The legislative history of the Warranty Act similarly fails to reveal a congressional intent to prohibit arbitration. Indeed the only relevant legislative history demonstrates that Congress expressly contemplated that arbitration would be available (as an alternative to litigation) to resolve Warranty Act claims.

With no support in the text or legislative history, petitioners rely heavily on an FTC regulation which purports to prohibit binding arbitration of Warranty Act claims. But agency interpretations of a statute are simply irrelevant to the *McMahon* inquiry. It is Congress's intent, not an agency's intent, that matters when deciding whether one statute overrules a prior statute. This Court made that very point just last year when it emphasized that administrative policy preferences cannot overrule prior acts of Congress. *FCC v. NextWave Pers. Communications,*

Inc., 537 U.S. 293, 304 (2003). In any event, even if the FTC had been delegated authority to overrule a prior act of Congress – and it has not been – its views would not be entitled to deference under *Chevron* because they rest on an outmoded hostility to arbitration that has since been rejected by this Court.

I. THERE IS NO CONFLICT THAT REQUIRES RESOLUTION BY THIS COURT.

Petitioners suggest that this Court should grant the petition to resolve an important conflict in the lower courts and bring uniformity to the law. Although the question presented is certainly an important one, petitioners fail to explain that federal and state courts have reached an essentially uniform consensus on that question. Thus, there is no conflict to resolve because every federal appellate court and state supreme court to decide the question has held, consistent with the Illinois Supreme Court in this case, that the Warranty Act does not prohibit binding arbitration. Pet. App. 2; *Davis*, 305 F.3d 1268; *Walton*, 298 F.3d 470; *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex. 2001); *Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131 (Ala. 2000); *Abela v. General Motors Corp.*, 677 N.W.2d 325 (Mich. 2004).[1]

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[1] *See also Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73 (Ga. Ct. App. 2000), *aff'd on other grounds*, 548 S.E.2d 342 (Ga. 2001); *Howell v. Cappaert Manufactured Hous., Inc.*, 819 So. 2d 461 (La. Ct. App.), *writ denied*, 827 So. 2d 1161 (2002); *Dombrowski v. General Motors Corp.*, 318 F. Supp. 2d 850 (D. Ariz. 2004); *Pack v. Damon Corp.*, 320 F. Supp. 2d 545 (E.D. Mich. 2004); *Sikes v. Ganley Pontiac Honda*, No. 79015, 2001 WL 1075726 (Ohio App. 8th Dist. Sept. 13, 2001).

In light of these developments, the *only* aberrant jurisdictions that still adopt the position advocated by petitioners (*i.e.*, that the Warranty Act precludes arbitration) are two federal district courts and one state trial court in Virginia (all of which issued their decisions before *Davis* and *Walton*), and a federal district court decision in Ohio.[2]

In search of a split in authority, petitioners seek refuge in the Mississippi Supreme Court's decision in *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002), but that decision does not help them. In *Parkerson*, an evenly divided Mississippi Supreme Court affirmed an intermediate appellate court's holding that the FAA did not mandate enforcement of arbitration clauses within written warranties. However, *Parkerson* is not even legally binding in Mississippi on this point because only four of eight Justices approved this holding; three Justices clearly rejected it and one Justice, while concurring in the result, expressed no opinion on the matter. *See Buffington v. Mississippi*, 824 So. 2d 576, 580 (Miss. 2002) ("It is true that a majority of all sitting judges is required to create precedent, and therefore, it follows that a plurality vote does not create a binding result.") (internal quotation omitted). In any event, the *Parkerson* plurality relied on the district court decisions that were expressly overruled by *Davis* and *Walton*.

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[2] *See Browne v. Kline Tysons Imports, Inc.* 190 F. Supp. 2d 827 (E.D. Va. 2002); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958 (W.D. Va. 2000); *Philyaw v. Platinum Enters., Inc.*, No. CL00-236, 2001 WL 112107 (Va. Cir. Ct. Jan. 9, 2001); *Rickard v. Teynor's Homes, Inc.*, 279 F. Supp. 2d 910 (N.D. Ohio 2003).

In sum, the law is uniform and there is no split for this Court to resolve. The federal appellate courts and state courts of last resort have reached a unanimous conclusion: the Warranty Act permits binding arbitration.

II. PETITIONERS' MAIN ARGUMENT – THAT THE ILLINOIS SUPREME COURT ERRONEOUSLY APPLIED *CHEVRON* – CALLS FOR MERE ERROR CORRECTION AND THUS DOES NOT MERIT REVIEW BY THIS COURT.

Petitioners suggest this Court should grant review because the Illinois Supreme Court erroneously applied *Chevron* to invalidate an agency regulation. This request for error correction does not merit review.

As a preliminary matter, the Illinois Supreme Court's decision does not invalidate an agency regulation. The FTC has adopted a series of regulations to govern "informal dispute settlement mechanisms" ("IDSMs") under the Warranty Act, and has interpreted one of those regulations, 16 C.F.R. § 703.5, to prohibit binding arbitration. The Illinois Supreme Court's decision rejects that interpretation, but the FTC regulation itself retains full force to govern IDSMs under the Warranty Act.

While petitioners suggest that the rejection of an FTC interpretation of a regulation is an important event warranting intervention by this Court, *see, e.g.*, Pet. at 19, it is worth noting that the FTC itself has not demonstrated a similar level of concern about this regulation. The FTC is empowered to restrain warrantors from failing to comply with any requirement of the Warranty Act. 15 U.S.C. § 2310(c)(1). Yet, since it enacted its regulations more than 25 years ago, it has never once initiated an

enforcement action to test its interpretation or to restrain the thousands of warrantors who are supposedly violating the Act. It is hardly worth this Court's time to review an agency interpretation that the agency itself cannot be bothered to enforce.

At base, then, petitioners' argument reduces to a claim that the Illinois Supreme Court failed to defer to an agency regulation under *Chevron*. Even if this were true, petitioners' argument is nothing more than a request for error correction, and as such, it does not merit review by this Court. *See* Sup. Ct. Rule 10. This is especially true here because, as described below, the Illinois Supreme Court did not err. Like all the state supreme courts and federal appellate courts to consider the question, the Illinois Supreme Court properly declined to defer to the FTC's interpretation of the Warranty Act.

III. THE ILLINOIS SUPREME COURT CORRECTLY CONCLUDED THAT THE WARRANTY ACT DOES NOT PROHIBIT ARBITRATION.

According to petitioners, the Illinois Supreme Court erred because it failed to defer to an FTC regulation under *Chevron*. The Illinois Supreme Court did not err, however, because the FTC's regulations are completely irrelevant to the legal standards governing this case.

The central issue in this case is whether Congress in enacting the Warranty Act partially repealed the FAA, which otherwise makes all agreements to arbitrate "valid, irrevocable and enforceable." This Court has repeatedly instructed courts that they may not find that a subsequent act of Congress overrides the FAA unless Congress "*explicitly* preclude[s] arbitration" of claims under the later-enacted

statute. *Gilmer*, 500 U.S. at 29 (emphasis added). Furthermore, the party seeking to avoid arbitration (here, petitioners) bears the burden of demonstrating that Congress clearly intended to preclude arbitration, an intent that, if it exists at all, must be found in "[the statute's] text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227 (citation omitted). Evidencing the stringent nature of these requirements, no decision of this Court holds that Congress intended a later act to repeal the FAA and prohibit arbitration.

The Warranty Act is no exception. Although petitioners do not cite the *McMahon* test or make any attempt to apply it, that test controls the outcome here. There is nothing in the text, legislative history, or purposes of the Act that demonstrates a congressional intention to prohibit arbitration. And under the *McMahon* test, the FTC's regulations are simply irrelevant. But even if they were relevant, the Illinois Supreme Court properly declined to defer to the FTC's interpretation because it is an unreasonable interpretation of the Warranty Act.

A. Neither the Text, Legislative History, nor Purposes of the Warranty Act Demonstrates a Clear Congressional Intent to Prohibit Arbitration.

1. The plain language of the Warranty Act does not repeal the FAA or prohibit arbitration of consumer warranty disputes. In fact, the text and stated purpose of the Warranty Act do not mention arbitration at all. In other words, nowhere in the language of the Warranty Act does Congress expressly preclude binding arbitration of consumer claims arising under the Act, or even suggest that

arbitration of consumer warranty claims was a congressional concern. *See* Pet. App. 12-13 (quoting *Walton*), 14-15 (describing *Davis*); *Davis*, 305 F.3d at 1274-75; *Walton*, 298 F.3d at 475-76.

Indeed, a separate provision of the Act definitively repudiates any argument that Congress intended to preclude arbitration of Warranty Act claims. Section 111(b)(1) of the Act, 15 U.S.C. § 2311(b)(1), states that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." Congress explicitly preserved consumers' existing rights to arbitrate claims under the FAA, including the right to enforce arbitration agreements to which the consumer is a party. *See Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 281 (1995) (recognizing that ability to enforce arbitration agreements is an important right for consumers). This provision thus expressly negates any implied repeal of the FAA, and the rights and remedies it protects, by the Warranty Act.

Conspicuously, petitioners do not even cite the savings clause, much less point to any finding that Congress clearly intended to deprive consumers of the important rights and remedies provided by the FAA. And for good reason. The broad savings clause of Section 111(b) makes such a finding absolutely impossible. For it expressly instructs courts *not* to interpret the statute in precisely the manner petitioners do.

In the absence of any direct language precluding arbitration and with no discussion of the savings clause, petitioners rely on two arguments to support their assertion that the Warranty Act prohibits binding arbitration. Neither of these arguments supports their cause.

First, petitioners rely on Section 110 of the Warranty Act, 15 U.S.C. § 2310, which authorizes warrantors to create an informal dispute settlement mechanism, and argue that arbitration must fall within the scope of this new IDSM. Pet. at 16. But because the Warranty Act does not define the term IDSM, this argument rests entirely on inferences. Yet, as this Court has repeatedly held, inference is not enough. A subsequent act of Congress does not repeal the FAA unless Congress "explicitly" precludes arbitration. *Gilmer*, 500 U.S. at 29.

In any event, petitioners' argument is meritless. Section 110 is concerned with establishment of IDSMs, not arbitration. The gist of the new IDSM under Section 110 is to allow a warrantor to incorporate in its written warranty "a requirement that the consumer resort to such procedure [*i.e.*, an IDSM] before pursuing any legal remedy under this section respecting such warranty," in which case the consumer "may not commence a civil action (other than a class action)" under the remedies provision of Section 110(d) without first resorting to that procedure. *Id.* § 2310(a)(3)(C). *See also id.* § 2310(d)(1).

Therefore, in enacting the Warranty Act, Congress gave consumers a new statutory cause of action and provided warrantors with the option of establishing IDSMs that consumers would need to use *before* pursuing the new remedy. However, the mere fact that Congress provided consumers with a remedy that could arise after completing an IDSM does not mean that consumers could not choose to pursue that statutory remedy in an arbitration proceeding rather than a judicial forum.

Moreover, allowing warrantors to establish an *IDSM* that they may require consumers to resort to as a prerequisite to

filing a lawsuit does not evince a congressional intent to preclude *arbitration*. For the Warranty Act speaks only of an "informal dispute settlement mechanism." As both the Third and Fifth Circuits have explained, arbitration is not the same as an IDSM. *Walton*, 298 F.3d at 476 ("binding arbitration is not normally considered to be an 'informal dispute settlement procedure' "); *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 351 (3rd Cir. 1997) ("[T]he informal dispute resolution mechanism provided [by the Warranty Act] *does not constitute arbitration* within the meaning of the FAA.") (emphasis added). Furthermore, while the Warranty Act provides for an IDSM, it also states that that procedure must be used *before* filing suit in court; arbitration, however, is "generally . . . understood to be a *substitute* for filing a lawsuit, not a prerequisite." *Walton*, 298 F.3d at 475.

Finally, to conclude that Congress foreclosed *any* arbitration remedy, a court would necessarily have to find that Congress preempted each state's adoption of the Uniform Arbitration Act, which, like the FAA, makes arbitration agreements binding and enforceable without regard to the subject matter of the parties' dispute. Principles of federalism, however, preclude a finding of preemption unless that was the "clear and manifest intent" of Congress, a standard that petitioners have not even attempted to demonstrate in this case. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002).

Second, petitioners suggest that despite the clear command of *McMahon*, this Court should not insist on an explicit statement from Congress to preclude arbitration because, when the Warranty Act was enacted in 1975, arbitration was not widely used as a means for resolving consumer disputes. Pet. at 17-18 & n.4. However, this

identical argument could be made about many of the statutes that this Court has evaluated to determine whether they preclude arbitration. For example, the Securities Act of 1933, the Securities Exchange Act of 1934, the Truth in Lending Act (originally enacted in 1968), and RICO (enacted in 1970) – all of which can be enforced by consumers – were all passed well before the Warranty Act, and hence (according to petitioners) before arbitration had become a widespread alternative to litigation for consumers. Yet, this fact did not stop this Court from insisting on an express statement from Congress that it intended to preclude arbitration in any of those statutes. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989); *McMahon*, 482 U.S. at 232, 242; *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000). Because this Court required an express statement in those cases, there is no basis for excusing that requirement here.

In sum, an analysis of the text of the Warranty Act demonstrates that Congress did not express an intent to prohibit binding arbitration of consumer warranty claims.

2. As with its text, there is not a shred of evidence in the Warranty Act's legislative history that suggests Congress intended to preclude arbitration. In fact, the relevant legislative history shows that Congress knew the difference between arbitration and IDSMs and expressly contemplated arbitration of consumer warranty claims that could not be settled informally. Senators Magnuson and Moss introduced the first version of a consumer warranty bill in 1969. In 1970, the Senate Committee on Commerce issued a report interpreting the language of this forerunner of the Warranty Act. S. Rep. No. 91-876 (1970). That Senate Report states that "it is Congress'

intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances *without the aid of litigation or formal arbitration.*" *Id.* at 22-23 (emphasis added). Congress thus clearly understood that litigation and arbitration were equivalent alternatives if informal dispute *settlement* efforts failed.

Thus there is absolutely no evidence from its legislative history that Congress intended to prohibit arbitration or override the provisions of the FAA, let alone the clear expression of congressional intent required by *McMahon* and *Gilmer*. To the contrary, the only proper evidence of the Act's legislative history shows that Congress harbored no such intent.

3. Petitioners obliquely address the final part of the *McMahon* inquiry (whether arbitration conflicts with the Warranty Act's purposes) when they argue that the Illinois Supreme Court's decision allowing arbitration of Warranty Act claims harms consumers and thereby undermines the Warranty Act. Pet. at 19-20. Nothing could be further from the truth.

It would be futile to argue that there is any conflict between arbitration and the Warranty Act's express purpose "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C. § 2302(a). As this Court has repeatedly reminded courts, "by agreeing to arbitrate . . . a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial,

forum." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (quoting *Gilmer*, 500 U.S. at 26).

There is, in fact, "no inherent conflict between the [Warranty Act] and the FAA." *Walton*, 298 F.3d at 478. Indeed, arbitration promotes the purposes of the Warranty Act insofar as it provides consumers with a cost-effective, streamlined procedure to resolve their claims. This Court has repeatedly emphasized these pro-consumer benefits of arbitration. In *Terminix*, for example, this Court noted that "Congress, when enacting [the FAA], had the needs of consumers . . . in mind." 513 U.S. at 280. The relative inexpensiveness of arbitration is "helpful to individuals . . . complaining about a product, who need a less expensive alternative to litigation." *Id.* For consumers, "who seek[ ] . . . the value of only a defective refrigerator or television set," the costs and delays of litigation could "eat up the value of an eventual small recovery." *Id.* at 281. Consumers also benefit from arbitration in the form of cost savings passed on to them from the seller's reduced exposure to costly court litigation. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (Customers "benefit [from arbitration] in the form of reduced [prices] reflecting the savings that [the seller] enjoys by limiting the fora in which it may be sued.").

Accordingly, the FAA promotes and complements the pro-consumer goals of the Warranty Act. Because the FAA and the Warranty Act are "two statutes . . . capable of coexistence," it is this Court's "duty" to regard "each as effective." *NextWave*, 537 U.S. at 304 (internal quotations omitted). That is precisely what the Illinois Supreme Court did in this case.

B. The Illinois Supreme Court Correctly Declined to Defer to the FTC's Unreasonable Interpretation of the Warranty Act.

Given the lack of any *text, history, or purpose* to support its interpretation of the Warranty Act, petitioners seize on an FTC regulation, 16 C.F.R. § 703.5, and the FTC's statements about that regulation, to argue that the Warranty Act overrides the FAA and prohibits arbitration of Warranty Act claims. Reliance on these FTC statements is unwarranted, however, because the FTC's views are irrelevant to the *McMahon* standard, and in any event, they are not entitled to any deference.

1. Although the FTC has authority to implement portions of the Warranty Act, it has no authority to interpret the Warranty Act to override the FAA. Under the *McMahon* standard, it is the intent of Congress, not an agency, that is determinative in deciding whether a subsequently enacted statute abrogates the FAA's emphatic federal policy making arbitration agreements binding, irrevocable and enforceable. *See McMahon*, 482 U.S. at 234 n.3 (rejecting reliance on long-standing agency rule that Exchange Act precluded arbitration). Thus, the Fifth Circuit rejected reliance on the FTC's regulations, stating that "[a]n agency's regulations, promulgated pursuant to a statute, are not part of [the *McMahon*] test." *Walton*, 298 F.3d at 479. Simply put, because an agency's regulations cannot determine whether one Congress intended to override the acts of a prior Congress, they are irrelevant to the central question governed by the *McMahon* test.

This conclusion – that agency interpretations are irrelevant under the *McMahon* standard – is merely an application of the basic principle, recently reaffirmed by

this Court in *NextWave*, that an agency may not interpret a statute to deny the clear rights provided in a different act of Congress. As this Court expressly held in *NextWave*, "administrative preferences cannot be the basis for denying respondent rights provided by the plain terms of a law." 537 U.S. at 304.

Similarly, here, the FAA makes agreements to arbitrate "valid, irrevocable, and enforceable," 9 U.S.C. § 2, and this guarantee provides significant rights for consumers and other signatories to arbitration agreements. *See Terminix*, 513 U.S. at 281. Nevertheless, as in *NextWave*, the FTC has interpreted the Warranty Act to prohibit binding arbitration of claims arising under that Act, thereby denying consumers and warrantors their rights under the plain terms of the FAA. Because, as in *NextWave*, the Warranty Act does not *require* this interpretation, the FTC's policy preference "cannot be the basis for denying . . . rights provided by the plain terms of a law." 537 U.S. at 304. In short, because there is no inherent conflict between the Warranty Act and the FAA, this Court has a "duty" to regard "each as effective," *id.*, regardless of the FTC's preference to the contrary.

2. Even if the FTC's regulation were relevant to determining whether one act of Congress (the Warranty Act) overrides another act (the FAA) the Illinois Supreme Court properly declined to defer to the FTC's views. An agency's interpretation is entitled to *Chevron* deference only if Congress has not spoken to the precise question at issue – if, in other words, the statute is silent or ambiguous on the topic. *Household Credit*, 124 S. Ct. at 1746-47; *see Chevron*, 467 U.S. at 843-44. But here, if the Warranty Act is silent or ambiguous regarding arbitration, then, by definition, Congress has not clearly expressed its intent to

override the FAA as required by *McMahon*. *See supra* at 9-10. In short, the factual predicate for *Chevron* deference – silence or ambiguity in the statutory language – refutes any argument that Congress explicitly precluded arbitration, as required by *McMahon*, when it enacted the Warranty Act.

3. In any event, the FTC's interpretation is unreasonable. Section 703.5(j) of the FTC's regulations provides that "[d]ecisions of the [IDSMs] shall not be legally binding on any person." Although the FTC never expressly states that "IDSM" should be interpreted broadly to include all non-judicial dispute resolution processes (including arbitration), the FTC has indicated that it interprets Section 703.5(j) to preclude binding arbitration. *See* 40 Fed. Reg. 60,168, 60,210 (Dec. 31, 1975). The FTC explained that it had adopted this interpretation because "[t]he Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers." *Id.* In 1999, the FTC reaffirmed this original rationale, stating expressly that it "believes that this interpretation continues to be correct." 64 Fed. Reg. 19,700, 19,708 (Apr. 22, 1999). The FTC further stated that its interpretation rested on the language of the Act providing that "the consumer may not commence a civil action . . . *unless he initially resorts to such* [informal dispute settlement] *procedure*." *See id.* (quoting 15 U.S.C. § 2310(a)(3)). According to the FTC, "this language clearly *implies* that a mechanism's decision cannot be legally binding, because if it were, it would bar later court action." *Id.* (emphasis added).

The Illinois Supreme Court properly rejected reliance on the FTC's regulation. The FTC's asserted justifications

for its regulation are unreasonable because they all conflict with this Court's precedent. The FTC's 1975 statement that arbitration might not adequately protect consumers is based on an inappropriate hostility to arbitration, and therefore an impermissible reading of the statute. This Court "in *McMahon* . . . rejected this same hostility shown by the SEC." *Davis,* 305 F.3d at 1279; *see McMahon*, 482 U.S. at 234 n.3.

Furthermore, the FTC's 1999 statement that the language of Section 110 "clearly *implies* that a mechanism's decision cannot be legally binding," is similarly inconsistent with this Court's precedent. For, even if arbitration were deemed an IDSM – which defies all evidence to the contrary – mere "implication" is *never* enough to override the provisions of the FAA. *See Gilmer*, 500 U.S. at 27-30; *McMahon*, 482 U.S. at 236-38.

Finally, if it is the FTC's position that the provision of a civil remedy in Section 110(d) precludes arbitration, that rationale also cannot survive modern precedent interpreting the arbitration of statutory claims under the FAA. This Court has repeatedly rejected arguments that claims under employment discrimination laws, the federal antitrust laws, RICO, and the securities laws, all of which provide for civil actions just like Section 110(d), are not subject to arbitration. This precedent requires that Section 110 of the Warranty Act be interpreted as providing an informal, non-binding settlement mechanism to be followed by arbitration *or* a civil action if the consumer were

dissatisfied with the informal settlement result. *See Gilmer*, 500 U.S. at 29.[3]

At base, the FTC and petitioners have each made the same mistake. They have failed to accept, or even acknowledge, what this Court has repeatedly emphasized about arbitration – namely, that an agreement to arbitrate does not result in a loss of substantive rights, but merely transfers a dispute concerning those substantive rights from a judicial to an arbitral forum. Because "the FTC's motive behind [those] regulation[s] is contradictory to Supreme Court rationale," *Davis*, 305 F.3d at 1279, the Illinois Supreme Court properly concluded that the FTC's regulations are entitled to no deference. Pet. App. 19.

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[3] Indeed, the basis for this interpretation of Section 110 is even more compelling here than in *McMahon* because the statute there – unlike the Warranty Act – contained a provision that expressly prohibited parties from waiving provisions of the Act. The SEC had interpreted this non-waiver provision as prohibiting pre-dispute arbitration agreements because the SEC believed such an agreement constituted a waiver of the provisions of the Act granting injured parties the right to file a civil action. This Court rejected that argument, recognizing that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision," and that the "streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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